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NO. 84-438

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

V.

GERALD HILL and
JOSEPH CRAWFORD,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT

REPLY BRIEF OF THE PETITIONER

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ARGUMENT

I. THE DECISION OF THE COURT BELOW IS BASED UPON A DETERMINATION THAT THE CONSTITUTION REQUIRES JUDICIAL REVIEW OF THE FACTUAL FINDINGS OF A DISCIPLINARY BOARD.

The question of whether there is a constitutional right to judicial review

of the sufficiency of evidence adduced at prison disciplinary hearings is properly before the court.

Respondents and the Solicitor General assert that the issue was not before the court below and that the decision below is based upon Massachusetts statutory law. (Brief of the Solicitor General, 7; Brief of Respondents, 5-6). Such an assertion is incorrect.

First, in the court below, respondent devoted substantial argument for the assertion that, "The overwhelming weight of opinion is that a person being held in a correctional facility has a constitutional right to review of a disciplinary board's findings for the sufficiency of the evidence." (Brief for the Plaintiff-Appellant, Appeals Court Nos.

83-414, 83-528).[1/] Throughout respondents' brief it was consistently argued that "there is a constitutional right to substantive review by the courts of the decisions of disciplinary hearings." (Brief at 6). Moreover, neither party's briefs ever argued that there was a statutory right to such review provided by G.L. c. 249 §4.

Second, the Supreme Judicial Court characterized the issue presented by the Superintendent's appeal as "(1) the judge erred in reviewing the board's findings for the sufficiency of the evidence because there is no constitutional right to judicial review of a disciplinary board's findings. The

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1/ A copy of the briefs submitted to the Supreme Judicial Court have been lodged with the Office of the Clerk.

court found: "There is no statutory right of review." (Cert. Pet. App. 4, n.3). The court further concluded that "inmates have a constitutional right to ... review" of the sufficiency of evidence to warrant the findings of a disciplinary board. (Cert. Pet. App. 15).

It is therefore not surprising that the decision is phrased in terms of a constitutional right to "judicial review" for that was the issue before the court. The reference by the court to c. 249 §4[2/] is, it is suggested,

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2/ As amended in 1973, c. 249 §4 provides:

> A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme

(footnote continued)

merely to advise that the proper procedural vehicle for bringing the issue before the court for review, given that review is constitutionally required, is by way of an action

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(footnote continued)

> judicial or superior court. Such action shall be commenced within two years next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require. Amended by St. 1963, c. 661, §1, c. 1114, §289.

in the nature of certiorari,[3/] rather than in the form of a complaint entitled "writ of habeas corpus ad testificandum". (Cert. Pet. App. A2, n.2).

Cepulonis v. Commissioner of Correction, 15 Mass. App. Ct. 292 (1983), referred to by respondents at page 6 of their brief, is inapposite. There, the Appeals Court considered, under G.L. c. 249, §4, whether a prison disciplinary board's findings were based on "reliable" evidence, as required by a 1975 state regulation. No issue was

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3/ The Supreme Judicial Court had not previously resolved the question of whether the validity of an adjudication by a disciplinary board must be challenged by an action in the nature of certiorari. Nelson v. Commissioner of Correction, 390 Mass. 379, 388 n.12 (1983).

raised regarding the constitutional right of a prisoner to judicial review of sufficiency of the evidence before a disciplinary board, although the court did note that a constitutionally-based claim would raise a separate question from that before it. Id. at 295-96. See also, Wightman v. Superintendent, M.C.I., Walpole, 19 Mass. App. Ct. 442 (1985), wherein the Appeals Court, faced with a challenge to disciplinary board findings under state regulations and the State and Federal Constitutions, reached only the regulation-based claim.

Petitioner therefore submits that the issue before the court below was whether the Constitution required judicial review of the findings of fact by a disciplinary board and that the court below held, based upon the Federal Constitution, that judicial review was

required and that this "entitlement logically follow[ed]" from the decision of this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Hill v. Superintendent, 392 Mass. 198, 466 N.E.2d 818 (1984) (Cert. Pet. App. 10). Therefore, petitioner submits that under the principles enunciated in Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469 (1983), this court has jurisdiction to review and decide the issue of a constitutional right to judicial review.

> "Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf solely because of a mere possibility that an adequate and independent ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground. It appears to us that the state court 'felt compelled by what it understood to be federal constitutional to construe

> ... its own law in the manner it did.' Zacchini v. Scripps - Howard Broadcasting Co., 433 U.S. 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977)* (footnote omited) Id. at 3477-3478.

See also, Delaware v. Prouse, 440 U.S. 648, 653 (1979).

II. THE EXISTENCE OF A DEPARTMENTAL REGULATION ESTABLISHING A STANDARD OF PROOF IN DISCIPLINARY BOARD HEARINGS DOES NOT DICTATE THE SCOPE OF JUDICIAL REVIEW TO BE GIVEN THE FACT FINDINGS OF THE BOARD.

Respondents suggest that Department of Correction regulations placing the burden of proof on the proponent of the disciplinary report and directing the board to make its findings on the basis of the preponderance of the evidence dictates the scope of judicial review. (Brief of Respondents, 17). Such an assertion ignores the distinction between the scope of judicial review and

the standard of proof in the initial decision-making tribunal. The difference is "a common-place in the law". Woodby v. INS, 385 U.S. 276, 282 (1966). The evidentiary standard imposed by state regulations in no way dictates the constitutional standard applicable on judicial review. Id. Moreover, while state regulations may require a certain degree of proof in the fact-finding tribunal, that may be a matter of state law and not a constitutionally required standard. See, California v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam).

Contrary to respondents' contention (See, Brief of Respondents, p. 19), violation of the state's regulations would not, in and of itself, constitute a violation of the due process clause.

See, United States v. Caceres, 440 U.S. 741, 752 (1979); King v. Higgins, 702 F.2d 18, 20 (1st Cir.), cert. denied sub nom.; Vinzant v. King, ____ U.S. ____, 104 S.Ct. 404 (1983).

CONCLUSION

For the reasons stated in his brief and in this reply brief, petitioner respectfully requests this Court to reverse the judgment of the Court below.

Respectfully submitted,

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